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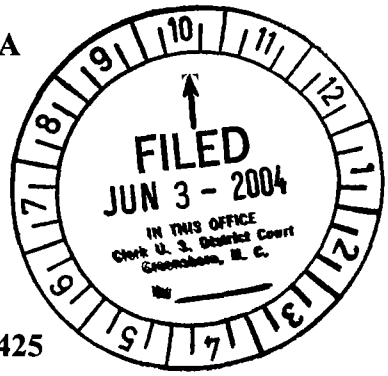
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



SUN CHEMICALS TRADING CORPORATION and AHMET CULLU,	)	
Plaintiffs,	)	
v.	)	**1:01CV00425**
CBP RESOURCES, INC., SGS CONTROL SERVICES, INC., and PASTERNAK, BAUM & CO.,	)	
Defendants.	)	

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the motion of Defendant SGS Control Services, Inc. ("SGS") to dismiss Plaintiffs' First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Local Rule 7.3 (Pleading No. 84). Plaintiffs Sun Chemicals Trading Corporation ("Sun") and Ahmet Cullu ("Cullu") filed a response in opposition to SGS' motion, and SGS filed a reply. The motion is ready for a ruling.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Cullu is the President of Sun, a Turkish corporation. (Pleading No. 34, Pl.s' First Amended Compl. ¶ 2.) Beginning in February, 1998, Cullu on behalf of Sun entered into five purchase order contracts with Defendant CBP Resources, Inc. ("CBP") for the purchase of 3,500 metric tons of feed grade yellow grease. *Id.* ¶ 9. During contract negotiations, Cullu informed CBP that the yellow grease was to be exported to Turkey, and that Muslims in Turkey were prohibited under religious law from eating swine products, including pig-derived fat (lard). *Id.* ¶¶ 14, 42-43. The purchase order contracts specified that the yellow grease must not contain any lard. *Id.* ¶ 9.

Defendant Pasternak, Baum & Co. ("Pasternak") brokered the purchases between Sun and CBP. *Id.* ¶ 12.

CBP retained the services of Defendant SGS to test the yellow grease for the presence of lard. *Id.* ¶¶ 22, 23. SGS was also informed that the presence of lard in the grease would result in violation of the religious laws of Turkey. *Id.* ¶¶ 14, 42-43. The testing performed on the grease by SGS detected no lard, and SGS issued certificates to CBP to that effect. *Id.* ¶¶ 11, 23. In turn, CBP issued notarized affidavits to Sun informing Sun that the yellow grease did not contain any lard, pork, or pig-derived fat. *Id.* ¶ 10.

After the yellow grease was exported to Turkey, concerns arose that the grease was contaminated with lard. *Id.* ¶ 15. Cullu requested that CBP and SGS provide additional assurances that the yellow grease did not contain any lard. *Id.* CBP allegedly refused to provide additional assurances because there was no actual test that could be used to accurately detect the presence of lard in the yellow grease. *Id.*

Plaintiffs commenced this action against Defendants on April 23, 2001, alleging claims of breach of contract, fraud, breach of express warranty, breach of the implied warranties of merchantability and fitness for a particular purpose, and unfair and deceptive trade practices. All three Defendants filed separate motions to dismiss on various grounds. On September 7, 2001, Plaintiffs amended their complaint to include claims of intentional and negligent infliction of emotional distress, and Defendants renewed their motions to dismiss. Pursuant to a Consent Order filed on June 17, 2002, the Court dismissed both Plaintiffs' claims of intentional infliction of

emotional distress and Sun's claims of negligent infliction of emotional distress with prejudice and submitted all of Plaintiffs' remaining claims against CBP and Pasternak to arbitration.[1]

Plaintiffs agreed to settle their dispute with Pasternak for $77,500, and on May 16, 2003, Plaintiffs filed a Stipulation of Dismissal with Prejudice as to Pasternak. Plaintiffs' claims against CBP proceeded to arbitration over eight days in April, May and June of 2003. On July 9, 2003, the arbitration panel issued an award of approximately $1.35 million to Plaintiffs. CBP notified the Court on October 15, 2003 that it had fully satisfied the arbitration award.

On November 7, 2003, the Court lifted the stay it had previously ordered pending arbitration, and on December 16, 2003, the Court entered a discovery scheduling order governing the remaining claims by Plaintiffs against SGS. The scheduling order expressly permitted SGS to file at any time a motion to dismiss on the grounds that Plaintiffs had obtained a full recovery for their injuries at arbitration. On February 26, 2004, SGS filed the instant motion to dismiss.

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995). Accordingly, such motions "should be granted only in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). When considering a motion to dismiss, the plaintiff's allegations must be taken as true. *Revene v. Charles County Commissioners*, 882 F.2d 870, 873 (4th Cir. 1989). Therefore, a motion to dismiss

[1] The purchase order contracts between Sun/Cullu and CBP and Pasternak contained binding arbitration clauses. SGS, as a non-party to the purchase order contracts, was not bound by the arbitration clauses and did not participate in the arbitration. Plaintiffs' claims against SGS were stayed by the Court pending the arbitration.

under Rule 12(b)(6) should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *DeSole v. United States*, 947 F.2d 1169, 1177 (4th Cir. 1991)(quoting *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 457 (4th Cir. 1983)).

DISCUSSION

At the outset, the Court notes that Defendant SGS relies on matters outside the pleadings in bringing its motion to dismiss pursuant to Rule 12(b)(6). Specifically, SGS has attached to its memorandum a copy of the arbitration award in favor of Plaintiffs and four sworn affidavits signed by a corporate officer of Defendant CBP. (Pleading No. 85, Def.s' Mem. in Supp. of Mot. to Dismiss, Exs. A, C.) Generally, under Rule 12(b) of the Federal Rules of Civil Procedure, if a district court considers materials outside the pleadings, the court must convert the 12(b)(6) motion to a Rule 56 motion for summary judgment and give the non-moving party notice and a reasonable opportunity to respond. *See* Fed. R. Civ. P. 12(b); *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985). However, a court may "consider certain materials – documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993); *Moore's Federal Practice*, § 12.34 (3d ed. 1999).

The Court concludes that SGS's motion to dismiss should not be converted to a motion for summary judgment. The Court has not considered the CBP affidavits in rendering its Recommendation herein, and finds that the arbitration award itself may be considered as a matter of judicial notice. Pursuant to Rule 201(b) of the Federal Rules of Evidence, courts may take judicial

notice of adjudicative facts that are "not subject to reasonable dispute." Facts are indisputable only if they are either "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Courts may take judicial notice of certain public records, including the "records and reports of administrative bodies." *Ritchie*, 342 F.3d at 909 (citations omitted). Here, the arbitration award is in the possession of both parties, and Plaintiffs do not dispute the authenticity of the award. Under these circumstances, the Court may properly consider the arbitration award in deciding Defendant SGS' motion to dismiss. *Poli v. SEPTA*, No. Civ.A 97-6766, 1998 WL 405052, *3 & n.1 (E.D. Pa. July 7, 1998)(unpublished opinion)(state court's order confirming arbitration award considered by federal district court under doctrine of judicial notice in deciding motion to dismiss under Rule 12(b)(6)).

The Court now turns to the merits of Defendant SGS' motion. SGS moves to dismiss Plaintiffs' complaint on two grounds: (1) Plaintiffs have already obtained a full and complete recovery for their injuries through the arbitration award and are not entitled to additional recovery from SGS; and (2) Plaintiffs are collaterally estopped from relitigating damages issues already determined by the arbitration panel. The Court finds merit to SGS' contention that Plaintiffs have obtained a full recovery for their injuries through the arbitration award, and therefore, does not reach the issue of collateral estoppel.

It is a fundamental principle of law that "when the plaintiff has accepted satisfaction in full for the injury done him, *from whatever source it may come*, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." *Lovejoy v. Murray*, 70 U.S. 1, 17 (1865)(emphasis added). The North Carolina courts have reaffirmed this precept: "Both reason and justice decree that there should be collected no double compensation, or

even overcompensation, for any injury, *however many sources of compensation there may be.*" *Holland v. Southern Public Utilities Co., Inc.*, 208 N.C. 289, _____ , 180 S.E. 592, 594 (1935)(emphasis added); *see also Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138 (2000)(well-settled that although plaintiff is entitled to full recovery for its damages, it is not entitled to a double recovery for the same loss or injury.)

Applying the above-cited principles to this case, it is clear Plaintiffs obtained a recovery for all of their compensable injuries at arbitration and are not entitled to further compensation from Defendant SGS. A review of the arbitration award reveals that the arbitrators carefully considered Plaintiffs' evidence detailing all of the various types of damages Plaintiffs claim to have incurred as a result of the purchase of the allegedly contaminated yellow grease. The arbitrators found that Plaintiff Sun suffered *no direct damages* because Sun was able to sell the yellow grease for more than Sun paid for it. However, the arbitrators found that "it was reasonably foreseeable that Sun would suffer the loss of its entire business in the sale of poultry feed in Turkey if its product were contaminated by pork" and awarded Sun $300,000 in anticipated lost profits, which was trebled to $900,000 under the North Carolina Unfair and Deceptive Trade Practices Act. As to Plaintiff Cullu, the arbitrators found that, as the owner of Sun, he had suffered the loss in value of Sun of $150,000. The panel also awarded Cullu $2,732 for temporary damage to his reputation and medical expenses. The arbitrators trebled the amount awarded to Cullu and then subtracted the $77,500 received in the settlement with Pasternak to reach a total award to Cullu of $380,696. Pursuant to the principles in *Lovejoy* and *Holland, supra*, Plaintiffs have recovered, through the arbitration award, all damages they are entitled to recover. Plaintiffs have wholly failed to show that the allegedly wrongful actions of SGS have caused Plaintiffs to suffer any category or kind of damages that were not considered

or awarded by the arbitration panel, nor are any such additional damages apparent from the pleadings before the Court.

The Court finds instructive the analysis in the *Chemimetals* case, *supra*. In *Chemimetals*, a corporation sued its former president for allegedly diverting profits and labor to himself. 140 N.C. App. at 136-37. After settling with the president, the corporation brought a second action against its board of directors and certified public accountants ("CPAs") alleging negligence in failing to notice the former president's unlawful acts. *Id.* at 137. The North Carolina Court of Appeals held that the corporation's second action was barred because the corporation had suffered but one injury, i.e., loss of value, which had been fully compensated by the recovery from the president:

> Chemimetals has suffered but one injury in this case – monetary loss due to the purported diversion of profits and labor from Chemimetals by McEneny. . . . [A]ll actions in the course of events leading to financial demise of Chemimetals were concurrent. Chemimetals' monetary loss, which was the injury created by McEneny's scheme, is the same injury caused by the alleged failure of the board of directors and CPAs to notice McEneny's unlawful acts. That only one injury occurred is in no way altered by the fact that the board of directors and CPAs may have been guilty of separate wrongdoing.

Id. at 139. Similarly, here, while CBP, SGS and Pasternak may have all committed separate acts of wrongdoing, their actions concurrently caused Plaintiffs to suffer the same injuries, and Plaintiffs have already been fully compensated for those injuries by the arbitration award.

Contrary to Plaintiffs' argument, it is of no moment that Plaintiffs are not seeking damages from SGS in a separate lawsuit from the action in which they collected damages from CBP and Pasternak. The principles in *Lovejoy, Holland* and *Chemimetals* apply whether the redundant damages are sought in the same suit or a second action. *See Simpson v. Plyler*, 258 N.C. 390, 395 (1963)("'It is a universal rule that where there has been a judgment against one . . . joint tort-feasor[],

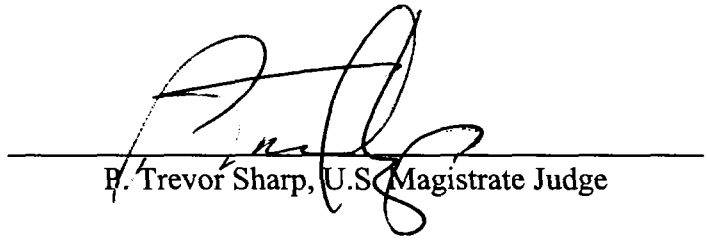
followed by an acceptance of satisfaction, all other tort[-]feasors are thereby released, and the judgment and satisfaction may be successfully pleaded by them to the maintenance *of the same or another suit by the same plaintiff involving the same cause of action.*'")(emphasis added)(citation omitted).

It is similarly of no moment that Plaintiffs sought between $9 and $85 million from the arbitrators and did not ultimately recover those sums in the arbitrators' award. Frequently, litigants do not receive the full damage verdict or judgment they seek. A "disappointing" result does not entitle a litigant to seek damages *for the same injuries* from another defendant in the hopes of a better recovery. Under North Carolina law, as explicated above, Plaintiffs are not entitled to more than one full and complete satisfaction for their specific injuries no matter how many claims or bases of liability they may assert, regardless of how many Defendants they may pursue. Under the detailed arbitration award, of which the Court takes judicial notice, they have made a recovery for all of the injuries they assert against SGS in this action. Their claim is barred.

CONCLUSION

For the foregoing reasons, **IT IS RECOMMENDED** that Defendant SGS' Motion to Dismiss Plaintiffs' First Amended Complaint (Pleading No. 84) be **GRANTED**; that Defendant SGS' other pending motions (Pleading Nos. 18, 42) be **DISMISSED AS MOOT**; and that Defendant SGS' motion for expedited treatment of its motion to dismiss (Pleading No. 86) be **DENIED.**

Further, **IT IS ORDERED** that discovery in this action is **STAYED** pending further proceedings on this Recommendation.



P. Trevor Sharp, U.S. Magistrate Judge

June 3, 2004